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Nos. 378 and 379

In the Supreme Court of the United States

OCTOBER TERM, 1961

LEO SHAFFER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PHILIP SHARE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINION BELOW

The opinion of the court of appeals (Pet. No. 378, pp. 49–60) is reported at 291 F. 2d 689.

JURISDICTION

The judgment of the court of appeals was entered June 13, 1961 (Pet. No. 378, p. 61). Petitions for rehearing were denied on August 2, 1961 (Pet. No.

378, p. 62). The petitions for writs of certiorari were filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for willfully attempting to evade wagering taxes by, *inter alia,* failing to file returns, the government is precluded from showing failure to file on the ground that, if such returns had been filed, they would have been incriminatory on a charge of prior failure to register.

2. Whether pre-trial publicity denied petitioners a fair trial.

3. Whether the evidence establishes that, in carrying on the business of accepting wagers, the petitioners were partners.

4. Whether the instructions to the jury were proper.

5. Whether the gambling paraphernalia seized pursuant to a search warrant were instrumentalities of the federal crime of engaging in the business of accepting wagers without having registered and paid the wagering occupational tax.

6. Whether, having been charged with and convicted of the misdemeanor of willfully failing to register, the petitioners should have been sentenced under the lesser penalty provided for merely failing to register.

7. Whether evidence that petitioners had failed to file wagering tax returns either at their places of residence or at Baltimore, Md., was properly admitted.

8. Whether an accountant, who testified as to a compilation of the total wagers received by petition-

ers, was properly asked hypothetical questions which assumed that the petitioners were partners.

STATUTES AND REGULATION INVOLVED

Internal Revenue Code of 1954:

Section 7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Section 7272 [68A Stat. 866]

(a) IN GENERAL.—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

* * * * *

Section 7701

(a) When used in this title, * * *—

(1) PERSON.—The term "person" shall be construed to mean and include an individual, * * * partnership, association, company * * *.

(2) PARTNERSHIP AND PARTNER.—The term "partnership" includes a syndicate, group, pool,

joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on * * *.

* * * * *

Treasury Regulations 132, Section 325.50 Registry, Return, and Payment of Tax:

(a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by * * * the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11–C. The return shall be filed with the collector of internal revenue for the district in which is located the taxpayer's office or principal place of business. If such taxpayer resides in the United States but has no office or principal place of business in the United States, the return shall be filed with the collector of internal revenue for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return shall be filed with the Collector of Internal Revenue, Baltimore, Md. * * *.

* * * * *

STATEMENT

Petitioners were convicted [1] by a jury in the United States District Court for the Southern District of Indiana on all five counts of an indictment charging

[1] Joseph Jacobson and Charles L. Sumner were also convicted but did not appeal.

violations of the wagering tax provisions of the Internal Revenue Code of 1954. Count I charged petitioners with conspiring to attempt to evade the excise tax on wagering (Govt. 2205–2209).[2] Counts II, III and IV, covering September, October and November of 1957, respectively, charged petitioners, as copartners in a wagering syndicate, with willfully attempting to evade the wagering excise tax by failing to file returns and pay the required tax, in violation of 26 U.S.C. 7201 (Govt. 2209–2214). Count V charged petitioners with willfully failing to register (as required by 26 U.S.C. 4412), in violation of 26 U.S.C. 7203 (Govt. 2214–2215). Each petitioner was sentenced to concurrent four-year imprisonment terms on the first four counts; to a one-year consecutive imprisonment term on Count V; and to fines of $10,000 on Count I, $10,000 on Count II and $5,000 on Count V (A. 1582–1591).

The evidence may be summarized as follows:

Petitioner Wyatt leased the third floor of a business building in Terre Haute, Indiana, from September 1, 1957, paying $1,000 in advance and saying he wanted to "put in a sports service" for "[t]hree or four months" (A. 398–404). The premises could be reached by a separate street entrance marked "671½" Wabash Avenue, located between a shoe store and a restaurant, and then through two inner doors on the second and third floors, respec-

[2] The three-volume blue government appendix will be cited with the prefix "Govt." The volume containing the government's exhibits, which are in numerical order, will be cited by exhibit number, rather than by page. The petitioners' two-volume yellow appendix will be cited with the prefix "A".

tively (A. 675–676, 709, 803; Govt. 778, 812–814). Wyatt also arranged for the installation of eight telephones with unpublished numbers in two banks of four telephones each, so arranged that the telephones in each bank would ring in rotation if the first number were busy. Wyatt deposited $5,000 for estimated long distance toll charges and requested five credit cards. He told the manager of the telephone company to classify the business as "sports service" but later changed the classification to "none" (A. 314–329, 350–353, Ex. 26). Wyatt also obtained from Western Union a sports ticker tape service which was not to be used for gambling purposes (A. 407–409, 412–415, Ex. 39).

On September 12, 1957, Wyatt registered with the Internal Revenue Service, and paid the occupational tax, to accept wagers at 671½ Wabash Avenue "on his own account", stating that he had no employees or agents (A. 293–303, Ex. 1).[3]

The other defendants arrived in Terre Haute between September 13 and September 26, 1957, and registered in two hotels. Wyatt had reserved a suite of three adjoining rooms at one nearby hotel (A. 366–367). Petitioner Leo Shaffer registered as being from Indianapolis (Ex. 29); petitioner James Tamer from Miami, Florida (Exs. 31, 35); petitioner Jules Horwick from Chicago, Illinois (Ex. 32); defendant Joseph Jacobson from Indianapolis (Ex. 30); petitioner Philip Share from Sherman Oaks, California (Ex. 37); defendant Charles L. Sumner from Indianapolis

[3] The occupational tax stamp was displayed on the wall when the agents raided the premises (A. 776).

(Ex. 33) and petitioner Irwin Gordon from Las Vegas, Nevada (Ex. 36).

Petitioners Shaffer and Horwick contracted with William Kaplan of Chicago to mail their customers a weekly sports forecast. Mr. Kaplan had been in the sports service business as a handicapper since 1929, and was acquainted with all the petitioners except Wyatt. Shaffer told Kaplan to carry his account under the name of "E. M. Wyatt" (A. 1149–1152, 1167–1174).

During the following weeks, government agents kept the petitioners and the premises at 671½ Wabash Avenue under surveillance (A. 568–660, 695–696). All petitioners entered and left the premises, using a key to the entrance. The only other person seen entering was a janitor (A. 568–660, 691). Most registered mail was delivered by leaving it at the adjoining restaurant (A. 450, 468, 590).

On November 29, 1957, acting under a search warrant, the government agents raided the premises (A. 695–710). They found six of the defendants seated around a table, answering the telephones (A. 709). There was a large board in the center of the table containing schedules of football games; the room also contained various paraphernalia used in wagering, such as pencils, pads around the telephones, and betting slips (A. 710). The agents seized this material (A. 712–769).

More than 50 bettors from all parts of the United States testified they placed wagers by telephoning the special telephone numbers in Terre Haute. (See list in petition for Shaffer *et al.*, pp. 9–11; see also

petition of Share *et al.*, p. 6).[4] Betting slips found at the time of the raid, some of which were identified by handwriting experts as in the handwriting of the petitioners, totaled over one million dollars (A. 1289–1308, Ex. 136, and see analysis, Govt. 2225–2238), and related primarily to football games to be played on five dates. Also found at the time of the raid was a record of accounts receivable and payable, covering more than 200 bettors (Exs. 137, 138). The net amount there shown as due and payable, which may be substantially less than the total gross wagers upon which the tax is computed, was $1,844,707 (A. 1324).

From approximately September 13 to November 29, 1957, more than 5,000 telephone calls were charged to the premises. No figure is available to show all the calls (including those not charged to the special numbers) made and received. The total telephone expense during this period was $9,784.49 (A. 334–339).

Petitioner Wyatt filed monthly wagering tax returns showing gross wagers of $620 for September (Ex. 2), $2,005 for October (Ex. 3), and $3,000 for November (Ex. 4). None of the other petitioners filed a registration or a wagering tax return in Indiana, or in the district where he resides, or in Baltimore, Maryland (the place of filing if one has no office or residence in the United States, see Treasury Regu-

[4] Since petitioners are in two groups, they will be referred to by the surname of the first petitioner in each petition, *i.e.*, the petition filed by Shaffer, Horwick and Wyatt will be referred to as the petition for Shaffer *et al.*, and the petition filed by Share, Gordon and Tamer will be referred to as the petition for Share *et al.*

lations 132, Sections 325.30 and 325.50) (A. 221–238, 257–267).

The court of appeals unanimously affirmed the convictions, stating (Shaffer *et al.* Pet., p. 54):

> * * * from a careful study of the record we are convinced that there was ample and substantial basis for the jury to conclude that the defendants conspired to utilize the registration and the monthly tax returns of Wyatt as a front to mask the magnitude of the wagering operation they actually conducted with the plan and design of evading the substantial tax actually due.

ARGUMENT

1. The petitioners Share *et al.* contend (Pet. 13–16) that the admission of evidence that they failed to file monthly wagering excise tax returns violated their privilege against self incrimination.[5] Their argument is that, since it is a federal crime to engage in the business of accepting wagers without having registered and paid the occupational tax, the filing of returns showing gross receipts from wagering would have shown that they engaged in such business at a time when they were not registered. The duty to file returns is, however, an inseparable part of the duty to pay taxes. Thus, petitioners in effect are arguing that the failure to pay one tax thereafter gave them an immunity for failing to pay other taxes when due.

[5] Petitioners emphasize that two of the three returns involved were due after arrest. However, the failure to file involved in Count II took place before arrest, and the sentence under that count was concurrent with sentences on the two other counts based on failure to file.

In a prosecution for evading wagering taxes, it was manifestly incumbent on the government to show that the taxes had not been paid. Those taxes were due whether the business was legal or illegal. *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *United States* v. *Doremus,* 249 U.S. 86 (narcotics); *Sonzinsky* v. *United States,* 300 U.S. 506 (firearms); *License Tax Cases,* 5 Wall. 462 (lotteries). Payment of taxes on wagers, after failing to register, would be no more incriminatory than would be the payment of taxes on liquor by an unlicensed dealer during prohibition—the situation before the Court in *Stafoff* v. *United States,* 260 U.S. 477, where the prosecution was upheld. Similarly, petitioners' failure to register their business did not excuse their failure to file returns and pay the taxes on the wagers which they took. When they went into the gambling business, they knew that they were going into a business subject to taxation. *Lewis* v. *United States,* 348 U.S. 419, 422–423, and see *United States* v. *Kahriger,* 345 U.S. 22, 32. Since Congress made their failure to pay those taxes subject to prosecution, the government was entitled to introduce proof of such failure to pay.

2. The claim of petitioners Share *et al.* that they could not obtain a fair trial because of pre-trial publicity (Pet. 16–18) is necessarily limited to publicity that occurred prior to the *voir dire* examination of the veniremen, for despite the length of this trial (June 24, 1959 to July 30, 1959), the jury was sequestered for the entire time (Govt. 319–322). By generalizing from the fact that there was pre-trial publicity which some jurors had seen, petitioners

argue that an impartial jury could not have been selected. The record, however, shows the contrary.

The trial judge conducted a searching and full examination of the veniremen which took two days (Govt. 88–317; A. 115–211). Some veniremen had never heard of the case (*e.g.*, Mr. Beck, A. 115, 117; Mr. Bruner, Govt. 129; alternate juror Mr. Myer, A. 201). Of the jurors who tried this case, only five had seen the specific articles which petitioners claim were prejudicial (Clark, A. 126; Buchanan, A. 147–148; Emswiler, A. 152; Fisher, A. 185; and Flint, A. 188), and none of these could recall all they had read (A. 126, 148, 153, 188). One juror had seen only the headlines (A. 185). Any prospective juror who suggested that he might have an opinion as to the guilt or innocence of petitioners was rejected (A. 131–133, 144, 165, 194, 196, 198, 202–203; Govt. 207–209). Not one petitioner exercised a peremptory challenge in the selection of alternate jurors (Govt. 317).

As this Court has held, in the determination whether there was "prejudice resulting from the reading by jurors of news articles concerning the trial * * * each case must turn on its special facts." *Marshall* v. *United States*, 360 U.S. 310, 312. The only showing made here was that jurors had heard of, and read about, the case. There was no showing of actual or probable prejudice or bias by the jurors. "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial * * *." Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245, 251. The ex-

tensive *voir dire* examination fully protected petitioners' rights to an impartial jury.[6]

3. The argument of petitioners Shaffer *et al.* that the government did not prove the partnership as charged in the indictment (Pet. 18–23) is refuted by the record.

Count I charged the individual petitioners with conspiring to violate the wagering laws (A. 18–19). Among the means alleged to accomplish this conspiracy was conducting a wagering business "as co-partners in a wagering syndicate". Counts II through IV charged that the individual petitioners "were engaged in a business of accepting wagers as co-partners in a wagering syndicate" and "the said defendants * * * did wilfully and knowingly attempt to evade and defeat the said excise tax * * *" (A. 23–24, 25, 26–27). Count V charged that petitioners were in the business of accepting wagers "as co-partners of a wagering syndicate" and "that said defendants * * * did wilfully and knowingly fail to register." (A. 28).

Petitioners' argument (Pet. 31) that the conviction can be supported only if the government proved a single partnership of all eight defendants is untenable. In describing the defendants as "co-partners," the indictment adopted the statutory definition of those terms. The statute (26 U.S.C. 7701) states that "[t]he term 'person' shall be construed to mean

[6] Petitioners' doubt that the government was innocent of creating the publicity (Pet. 17) is not justified by the record. The government denied during the trial that it was responsible for the publicity (A. 106). In any event, the relevant inquiry was the attitude of the jurors.

and include * * * partnership" and that "[t]he term 'partnership' includes a syndicate, group, pool * * * through or by means of which any business * * * or venture is carried on * * *." Thus, to prove a partnership under this definition it was not necessary to show all of the attributes of a partnership at common law; it was sufficient to prove a common enterprise by more than one person.

The evidence was clearly sufficient to show such a venture. For example, Govt. Ex. 139 (following Govt. 2240) graphically shows that although all petitioners accepted wagers (see partial analysis, Govt. 2225–2238), the winnings or losses on completed games were computed as a whole, thus indicating one indivisible syndicate operation.

Under the instructions, the court required two or more defendants to be found guilty as principals before others could be guilty as aiders and abettors (Instruction No. 41, A. 1549). Whether any particular petitioner was a member of the partnership was a question for the jury (see Instruction 35, A. 1542). The trial judge carefully instructed the jury that each petitioner had to be proved guilty of all the elements of the offense on each count (Instruction No. 35, A. 1541).

The foregoing discussion answers the contention of all the petitioners that the court erred in instructing on aiding and abetting (Share Pet. 18; Shaffer Pet. 32–35). So long as two or more defendants were partners, as the judge charged they must be before there could be any conviction, the others could have been properly convicted as aiders and abettors. For

the others, if not partners, at least knowingly aided the syndicate. Instruction No. 41 (A. 1549–1550) and other references to aiding and abetting in the instructions were therefore correct. *Nye & Nissen* v. *United States,* 336 U.S. 613, 618–619; *Direct Sales Co.* v. *United States,* 319 U.S. 703, 709.

4. A. The petitioners Share *et al.* claim the instructions to the jury misapplied *Ingram* v. *United States,* 360 U.S. 672, and permitted their conviction as "merely partnership employees" (Pet. 18–19).[7] But neither the instructions, nor the facts of this case, support their contention.

The trial judge specifically instructed the jury that if any defendant was not a partner and was "merely an employee of the alleged partnership * * * you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41" (Instruction No. 36, A. 1543–1544). He also instructed that any defendant who did not have knowledge of the wagering tax law requirements should be acquitted (A. 1545–1546).

The evidence supports the conviction under this charge. Unlike *Ingram,* there was here no conceal-

[7] As petitioners themselves note, this issue is of limited significance in view of the change in the statute in 1958, subsequent to this indictment. Section 4401 of Title 26 of the Code was amended by the Excise Tax Technical Changes Act of 1958, by adding the following sentence, 72 Stat. 1304: "Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

ment of the wagering operation for local purposes, since Wyatt had registered for the specific location involved (Ex. 1). Nor were the petitioners mere "employees". They had come to Terre Haute from different parts of the country, and were not there just to answer the telephone, but to obtain wagers for the syndicate. While there was evidence that the petitioners had some "pick-up" men who merely picked up money for the syndicate (A. 1241–1243), the evidence showed that each of the petitioners directly accepted wagers (see also discussion of the partnership, *supra,* pp. 12–14). Nor is there any question of the petitioners' knowledge of what was being done, since they were daily occupying a room with Wyatt, who had his occupational tax stamp prominently posted on the wall (A. 776).

B. The petitioners Shaffer *et al.* complain of the use of "and/or" in certain instructions (Pet. 42–43). Despite numerous other objections to instructions (A. 1442–1453, 1559–1577), petitioners failed to object to this at the trial. They thus are in no position to raise the issue now. See Rule 30, F.R. Crim. P. In any event, their contention is without merit. The term is readily understandable by jurors.

C. Petitioners Shaffer *et al.* complain generally that the number and length of the instructions confused the jury (Pet. 24–37), although they concede that the instructions correctly stated the law. This type of case, however, requires careful and meticulous instructions—as petitioners themselves recognized when they tendered about 100 proposed instructions to the trial judge (Govt. 2031–2069, A. 1434).

5. Petitioners Share *et al.* contend that the bank account records and the records of accounts seized under a search warrant were not instrumentalities of the federal crime of failing to register and pay the wagering occupational tax (Pet. 19–21). They assert that all gambling property "is not used for the commission of the offense but is evidentiary of it" (Pet. 20). The crime, however, is not merely failure to register, but the carrying on of the business of accepting wagers without having registered. Thus, an essential element of the offense is the carrying on of a wagering business; and the normal paraphernalia of a gambling operation are instrumentalities used in so doing. Since a book of accounts is necessary to the effective functioning of this business, the book was properly seized as an instrument used in committing the crime. The bank records were so closely related to the conduct of the business as to make them part of the equipment used in committing the crime, and thus subject to seizure. *Marron* v. *United States,* 275 U.S. 192, 199.

6. The claim of petitioners Share *et al.* that their sentence on Count V was excessive (Pet. 21–22) is frivolous.

Petitioners were sentenced to one year imprisonment and a $5,000 fine on Count V under 26 U.S.C. 7203, which provides that anyone "who willfully fails to pay such * * * tax, make such return * * * or supply such information * * * shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than

1 year, or both * * *". Count V charged that each petitioner "did wilfully and knowingly fail to register * * * [i]n violation of Section 7203 * * *" (A. 28). Since petitioners were charged with and convicted of a "willful" violation they were properly sentenced under Section 7203. They were not required to be sentenced under Section 7272 which provides a $50 penalty for mere (*i.e.*, nonwillful) failure to register.

7. The petitioners Shaffer *et al.* challenge the admission of government testimony that none of the petitioners filed the required tax returns in his home district or in Baltimore, Maryland (Pet. 37–42). Such proof was relevant and admissible.

The indictment charged that one of the means used in attempting to evade the tax was that the petitioners failed to file or pay the tax. It also charged petitioners with willfully failing to register. Sections 325.30 and 325.50 of Treasury Regulations 132 provide that, if the taxpayer has no office or principal place of business, the return shall be filed in the district of his residence, or, if he has no residence, with the collector of internal revenue at Baltimore, Maryland. It therefore was proper for the government, in proving a willful violation, to show not only that petitioners had failed to register at the place where they did business, but that they did not file at any other possible place.

8. Petitioners Shaffer *et al.* contend that it was improper to permit an expert accountant witness, in answering hypothetical questions about the total wagers received, to assume that petitioners were copartners

(Pet. 43–46). There is no merit in this contention. The testimony was relevant as an aid to the jury in computing significant totals of many hundreds of figures. These totals had no significance if the petitioners accepted the wagers as individuals rather than as members of a pool, syndicate or partnership. Since there was sufficient evidence to show the partnership (*supra*, p. 13), the questions were proper. Any danger that the questions might be misconstrued by the jury was eliminated when the court instructed the jury not to accept statements contained in the hypothetical questions unless their truth was shown by the underlying evidence (A. 1486–1487).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attoreny General.
BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

MORRIS A. SHENKER,
MURRY L. RANDALL,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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REPLY BRIEF.

ARGUMENT.

1. The Government misconceives, and only responds to a minor premise of, this contention (Br. Op. 9-10). On November 29, 1957, the defendants were arrested and charged with having conducted a wagering business without first registering and purchasing a stamp, in violation of the Occupational Tax Laws. Thereafter, they were further charged with having wilfully failed, after their arrest and while the Occupational Tax charges were pend-